

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Poulsen Roser ApS

Serial No. 76/130,886

Lori Krafte of Grennebaum, Doll & McDonald for applicant

Andy Corea, Trademark Examining Attorney, Law Office 101
(Angela Wilson, Acting Managing Attorney).

Before Hanak, Hairston and Bucher, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Poulsen Roser ApS (applicant) seeks to register in
typed drawing form VICTORY for "live roses." The
application was filed on September 19, 2000 based on a bona
fide intent-to-use the mark in commerce and ownership of a
foreign (Danish) registration of the same mark pursuant to
the provisions of Section 44(e) of the Trademark Act.

Citing Sections 1, 2 and 45 of the Trademark Act, the
Examining Attorney refused registration in the first Office
Action "because the proposed mark [VICTORY] is a varietal
name for the identified goods ... [and because] varietal (or

cultivare) names are generic designations and cannot be registered as trademarks."

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

There can be "no question that varietal names are generic designations and cannot be registered as trademarks." In re Delta and Pine Land Co., 26 USPQ2d 1157, 1159 n.4 (TTAB 1993) and cases cited therein. The sole issue before this Board is whether VICTORY is a varietal (generic) name for a type of living rose.

In support of her refusal, the Examining Attorney has made of record photocopies of the pertinent pages from the following four works: Modern Roses 10 (1993); Modern Roses XI The World Encyclopedia of Roses (2000); a printout from a website entitled Roses Help Me Find; and a printout from a website entitled EveryRose The Rose Reference Database. The first two reference works each have two listings for the term "Victory." (In this regard, it should be noted that all of the varietal designations listed in all four reference works are depicted with an initial capital letter.). The first Victory listing is followed by the letters LCL, the date 1918, and the names Dr. W. Van Fleet

and Mme. Jules Grolez. Both of these reference works then define the term "Victory" as follows: "Flowers deep pink, center darker, dbl., large; fragrant; vigorous, climbing growth." The only difference in definitions is that instead of employing the word "fragrant," the reference work Modern Roses XI The World Encyclopedia of Roses (2000) employs the words "moderate fragrance." The second listing for Victory in these two reference works is followed by the letters HT, the date 1920 and the name McGredy. The following definition then appears: "Flowers scarlet-crimson, dbl.; fragrant." The only difference is that in Modern Roses XI The World Encyclopedia of Roses (2000) the word "fragrant" is again replaced with the words "moderate fragrance."

As for the two websites previously mentioned, the website Roses Help Me Find contains essentially the same two definitions, whereas the website EveryRose The Rose Reference Database lists only the McGredy 1918 version of Victory.

Applicant has in no way challenged the aforementioned four reference works other than to note that no reference work is infallible, and that the work Modern Roses XI contains the following statement: "The absence of ™ or ® symbols in this publication should not be regarded as an

indication that these words, designations or names are not trademarks." (Applicant's brief page 4).

Obviously, no reference work is infallible. Moreover, it is quite common for reference works to contain disclaimers along the lines just mentioned. In this regard, a dictionary consulted at random [Random House Webster's Dictionary (2001)] contains the following disclaimer:

Trademarks

A number of entered words which we have reason to believe constitute trademarks have been designated as such. However, no attempt has been made to designate as trademarks or service marks all words or terms in which proprietary rights might exist. The inclusion, exclusion, or definition of a word or term is not intended to affect, or to express a judgment on, the validity or legal status of that word or term as a trademark, service mark, or other proprietary term.

To be quite blunt, applicant has offered absolutely no evidence whatsoever even remotely suggesting that these four reference works are in any way in error when they list Victory as a varietal (generic) term for two types of roses. If applicant were to have its way, then Examining Attorneys would not be able to rely upon any reference work since every reference work contains at least a few errors. If applicant felt that these four reference works were in error, he could have easily contacted the editors or publishers to have letters of correction issued.

In its brief at page 2, applicant articulates essentially three reasons why Victory is not a varietal (generic) name for roses. First, applicant notes that the two co-existing entries (definitions) for Victory "strongly suggest that the term does not function as a varietal name." Second, applicant argues that its trademark rights in VICTORY PARADE for roses "should be considered in allowing registration of VICTORY." Finally, applicant argues that its successful registration of VICTORY as a trademark in foreign jurisdictions (Austria, Benelux and Denmark) "strongly suggests the term is not a varietal name."

The fact that Victory designates two different varieties of roses does not mean that Victory is not a varietal (generic) name for both types. By way of analogy, the term "vehicle" is used in connection with cars, buses and trucks. However, the term "vehicle" is still generic for cars, buses and trucks. This Board has previously refused registration of DELTAPINE based on the fact that it was the most "prominent part" of numerous varietal (generic) names for various varieties of cotton, soybeans and corn. Delta and Pine Land Co., 26 USPQ2d at 1159.

As for applicant's argument that its trademark rights in VICTORY PARADE "should be considered in allowing

registration of VICTORY," we simply note that it is common practice to combine an arbitrary term with a generic term with the resulting combination being not generic.

Moreover, while of little consequence, applicant has not even established that it has registered VICTORY PARADE in the United States, as opposed to a foreign country.

Finally, as for applicant's foreign registrations of VICTORY, we simply note that the issue is not one of whether the mark can be registered in another country, but rather whether it can be registered in this country. In re Etablissements Darty et Fils, 759 F.2d 15, 225 USPQ 652, 654 (Fed. Cir. 1985). We note that at page 7 of its brief, applicant concedes "that registration of [VICTORY] in other jurisdictions is not dispositive" of registration in the United States.

Two final comments are in order. First, the Examining Attorney has made of record material from four reference works which demonstrates that Victory is a varietal (generic) name for two types of roses. Applicant has made of record absolutely no evidence to counter the Examining Attorney's evidence. Most telling is the fact that applicant has made of record no affidavits or declarations from buyers of roses - such as individual rose growers, landscaping companies or nurseries - to the effect that

they view Victory as a trademark of applicant, and not as a varietal (generic) name. This total lack of any submission of evidence on the part of applicant as to how purchasers of roses in the United States perceive Victory is most glaring. Delta and Pine Land Co., 26 USPQ2d at 1157.

("Such evidence (affidavits or declarations) showing how the asserted mark is actually perceived ... by the relevant public would have been helpful to applicant's case.")

Second, we are completely perplexed by that portion of applicant's reply brief where it alleges at pages 2 and 3 that in his "appeal brief, however, the Examining Attorney has shifted the grounds for refusal from one based on a finding that the mark sought to be registered is a varietal name to one based on a finding that the mark sought to be registered is a simple generic designation." From the very first Office Action, the Examining Attorney has refused registration on the basis that "varietal (or cultivare) names are generic designations and cannot be registered as trademarks."

In weighing all of the evidence of record, we find that the Examining Attorney has established that Victory is a varietal (generic) designation for two types of roses, and accordingly we affirm the refusal to register.

Decision: The refusal to register is affirmed.

